

Their prior consideration of the project and objections thereto, on the other hand, should materially facilitate Commission efforts to reach the correct decision.

40. In the light of these considerations, it seems to us reasonable and highly desirable to suggest that persons objecting to the construction of communications facilities on environmental grounds voice their objections first to responsible local, State or Federal land use officials (if any), so that the Commission may have the benefit of their views and of the insight into the matters at issue. If an objection is filed first with the Commission, it will not be dismissed, but the persons filing it may be requested to present his objection to appropriate land use officials; in that event action on the application will be deferred for a period which is reasonable under prevailing circumstances, pending the outcome of his efforts in this respect and Commission consideration thereof.”

Id. 1328-1329.

57. The Commission is now attempting to overturn over two decades of unchallenged precedent on the following points.

- That “local building, zoning and planning agencies . . . approval as well as the Commission’s is required.”
- That “Local, State and regional land use authorities . . . are obviously better situated than the Commission—by location, experience, and awareness of local values—to deal with land use questions.”
- That “Deference will be accorded to [Local and State] rulings and their views, particularly in matters of aesthetics and when the record demonstrates that environmental issues have been given full and fair consideration” and “that persons objecting to the construction of communications facilities on

environmental grounds voice their objections first to responsible local, State or Federal land use officials (if any)”. Id.

58. The Commission’s reasoning and conclusions when it implemented NEPA are correct. The Commission is now attempting to reverse its order implementing NEPA without going through the Environmental Impact Statement process. Reversing orders implementing NEPA have a significant environmental effect. An EIS is required.

OTHER ENVIRONMENTAL IMPACTS

59. Tower Lighting. Tower lights can have a significant effect on birds, as alluded to above. In addition, tower lights can have a significant adverse impact on astronomers and others who must observe the night sky. For this reason, states and localities have adopted statutes which limit outdoor nighttime lighting so as to not impede scientific observation of the sky.

60. CEQ rules state that one of the factors requiring an Environmental Impact Statement is the degree to which the proposed Federal action “may cause loss or destruction of significant scientific [or] cultural . . . resources.” 40 C.F.R. § 1508.27(b)(8). The proposed rule would gut or effectively prevent the enforcement of such laws and regulations. An EIS is required.

61. Perverse Effect. By effectively exempting broadcast towers and all related facilities from state and local laws, the Commission’s law will have the perverse effect of encouraging entities that cannot otherwise comply with such rules to collocate their facilities in conjunction with broadcast towers and their facilities. Such evasive tactics could be

attempted to get noxious industries or uses into areas from which they are precluded by zoning, health or safety requirements and to evade applicable environmental requirements.

62. Congressman Thomas J. Bliley, Jr. has specifically raised this concern with the Commission. His comments assert that the sites of broadcast towers “could then contain one or more large buildings, parking facilities, exterior lighting, etc. all of which would be exempt from local zoning and/or building regulations.” Comments prepared for Congressman Thomas J. Bliley, Jr. [filed in this docket] at 7.

63. Such consequences would have a significant adverse effect on the environment. An EIS is required.

64. Chinese Checkers. The Commission’s proposed rule would allow unimpeded expansion of broadcast towers so long as it was done in 300 foot increments: The Commission’s proposed rule provides that any state or local request for authorization to construct broadcast transmission facilities within 300 feet of an existing tower is automatically deemed granted if not acted on in 30 days.

65. The result is like a gigantic version of the child’s game “Chinese checkers.” Broadcasters can escape state and local laws and expand their facilities outward as far as they wish, so long as they do so in 300 foot increments. Such a result could have a significant harmful effect by allowing essentially unimpeded expansion of broadcast facilities so long as it is done in 300 foot increments, with consequent harm to the environment. An EIS is required.

66. Other Environmental Comments in this Docket. The Commission's March 6 Notice could be read to suggest that the Commission will only consider descriptions of the environmental impact of its rule that are set forth in comments or reply comments submitted in response to the Public Notice. Under NEPA, CEQ regulations and the Commission's own rules, Concerned Communities do not believe that the Commission can take such a narrow view of NEPA. As the CEQ rules state, the Commission is required to comply with the letter and spirit of NEPA. See, e.g. 40 C.F.R. §§ 1501, 1503. The Commission cannot "put blinders on" and assert that it will only look at a portion of the filings submitted in this docket and not look at other relevant ones. The only colorable basis⁵ for such a contention by the Commission would be if it had started a new proceeding to consider the environment impact of the proposed rule. It did not do so and expressly chose to consider such impacts as a part of the same docket number and proceeding. It therefore must consider all the filings in this docket in determining whether an EIS must be prepared.

67. To assist the Commission, the following is a partial, incomplete, but potentially helpful summary of certain key filings made in this docket which address the environmental impact of the Commission's rule and why an EIS is required.

68. National Wildlife Federation Letter. On December 1, the National Wildlife Federation submitted a filing in this docket which, among other things, requested an

⁵ Which Concerned Communities do not believe would be sufficient.

Environmental Impact Statement. Such letter has not been cited by the Commission, such as in its Notice of Proposed Rulemaking.

69. American Bird Conservancy. A December 1 letter of the American Bird Conservancy similarly requesting an Environmental Impact Statement. The Conservancy is a non-profit umbrella organization whose members include the World Wildlife Fund, Environmental Defense Fund, American Ornithologist Union and many others. Once again, the Commission appears to have overlooked this letter.

70. The Comments of the State of Vermont Environmental Board extensively describe the environmental concerns associated with the placement of broadcast facilities atop Mount Mansfield. See Comments of the State of Vermont Environmental Board, at 16-23. Those comments describe the purposes and policies behind Vermont's Act 250, which contains carefully prescribed procedures designed to minimize any adverse impact on the environment, and which would be effectively preempted by the Commission's proposed rule. Similar concerns were expressed by the Hardwick Action Committee with respect to the environmental impact on Buffalo Mountain, also in Vermont. See Comments from the Hardwick Action Committee. Those comments identified the "myriad of wild creatures" living in the general vicinity of a proposed cellular phone tower (e.g., black bears, grouse, deer, flying squirrels, wild turkeys, moose, porcupines, etc.), and predicting that the construction of the tower on the mountain (along with accompanying parking lot, trailer and half mile long road) "would destroy wild life habitat." Id., at 4.

71. Significant environmental concerns were also expressed by the Adirondack Park Agency with respect to New York's Adirondack Park, a six million (6,000,000) acre area in northern New York. The comments describe the area as "the largest designated Wilderness area east of the Mississippi River." Comments of the Adirondack Park Agency, at 1. The Agency's comments quote the "century old provisions" in the New York State constitution reflecting that state's public policy regarding the environmental preservation of wilderness lands of this nature. Id. The Commission's proposed rule would preempt not only this longstanding constitutional mandate, but also New York State statutes which would otherwise protect the park lands with respect to broadcast transmission facilities. The comments of the New York Department of State reflect similar concerns in connection with the preemption of the New York Environmental Quality Review Act, the state counterpart of NEPA. See Comments of the Department of State, State of New York.

72. Also illustrative of the environmental impact of the proposed rule are the comments of the Pinelands Commission of the State of New Jersey. Those comments discuss the Congressional designation of a large tract of land within the state as The Pinelands National Reserve, as well as the important national interests behind that designation. The statutory designation mandates the adoption of a Comprehensive Management Plan ("CMP") which, among other things, requires an assessment of the "scenic, aesthetic, cultural, open space, and outdoor recreation resources of the area together with a determination of overall policies required to maintain and enhance those resources." Comments of The Pinelands Commission, at 1. As a result of that assessment, the CMP

limits the height of structures (including radio and television transmission facilities) in certain areas of the Reserve “where future growth is severely restricted.” *Id.* at 2. The comments express extreme concern over the preemption of this rule and other CMP restrictions of that nature.

73. Another part of environmental concerns are public health and safety issues.⁶ Extensive comments were submitted in this docket by numerous aeronautical and pilot associations regarding the risks inherent in any preemption of state and local rules designed to ensure aviation safety. Considering that some of the broadcast towers will have a height in excess of 2,000 feet -- taller than any other man-made structures -- the risk to air craft of all types is readily apparent even to laymen. Such structures can present dangerous obstructions to aeronautical navigation and airport operations. See, e.g., Comments of the National Association of State Aviation Officials (noting the hazards to aircraft and passengers, the encroachment of navigable air space, and the reduction of area available for landing, take-off and maneuvering).

74. The concerns of public safety also implicate pedestrians and others on the ground. The comments of the National League of Cities cite three different situations where broadcast towers have crashed, with consequent loss of human life: the crash of seven towers in Minnesota and North Dakota during the course of a storm earlier this year, the crash of the 1,550-foot tower in the Dallas-Fort Worth area in October of 1996, and the recent crash of

⁶ As set forth above, under CEQ rules public health and safety issues may be environmental issues.

a broadcast tower in Jackson, Mississippi in late 1997. See Comments of the National League of Cities, et al., at 26. Because public safety is a critical dimension of the “quality of the human environment,” these concerns fall squarely within NEPA.

75. But perhaps the clearest indication that the Commission’s proposed rule implicates NEPA is evident in the comments submitted by various broadcasting companies. A number of those comments are quite critical of the expense and delay associated with environmental impact statements required by various state counterparts of NEPA. The Comments of Fant Broadcasting Company of Ohio and Fant Broadcasting Company of Massachusetts, for example, criticize the State Environmental Quality Review Act (“SEQRA”), effective in the state of New York, even while acknowledging that the statute is modeled after NEPA and in many cases “has been very useful in modifying projects during the review process in response to legitimate environmental concerns.” Comments of Fant Broadcasting Company of Ohio, et. al., at 2. See also Comments of Children’s Broadcasting Corporation, at 2, claiming an expenditure of over \$240,000 in order to comply with various county requirements (including the preparation of environmental reports) in connection with the relocation of its transmission facilities.

76. Even as broadcast companies such as these are seeking to avoid state and local regulation, communities such as the City and County of San Francisco have expressed their concern that the proposed rule would preclude cities from complying with their obligations under the California Environmental Quality Act (that state’s counterpart of NEPA). See Comments of the City and County of San Francisco, at 12. But that is precisely the point.

If the proposed rule is intended to bypass the state counterparts of NEPA (such as the New York's SEQRA and California's CEQA), then a fortiori the Commission's proposed rule will have a significant effect on the quality of the human environment, such that an Environmental Impact Statement is required.

77. If there was any doubt about this matter, the comments of the Named State Broadcasters' Associations clearly dispels it. Reflecting the position of broadcasters' associations in twenty-four states, those comments include recommended clarifications to the Commission's proposed rule. Among other changes, the associations request the addition of the following language clarifying the rule's preemptive scope by prohibiting any state or local government or instrumentality from denying (or delaying the disposition of, or conditionally granting) a request to place a broadcast facility on the basis of:

Any environmental matter involving officially designated wilderness areas, wildlife preserves, threatened or endangered species, wildlife habitats, historical sites listed or eligible for listing in the National Register of Historical Places, Indian religious sites, 100-year floodplains as determined by the Federal Emergency Management Agency ("FEMA"), flood insurance rate maps, significant changes in surface features (such as wetland fills, deforestation or water diversion).

Comments of Named State Broadcasters Associations, Exhibit A, at 2.

78. The specificity of this proposed language clearly evinces the broadcasters' desire to avoid regulations pertaining to the most sensitive of environmental and aesthetic sites. The broadcasters could not have stated their intentions more clearly. The Commission's proposed rule will have a significant impact on the environment. The

requirements of NEPA, including the preparation of an Environmental Impact Statement, are clearly mandated under these circumstances.

Respectfully submitted,

CONCERNED COMMUNITIES

Dated: April 13, 1998

By:


John W. Pestle

Dale R. Rietberg

VARNUM, RIDDERING, SCHMIDT & HOWLETT_{LLP}

BUSINESS ADDRESS AND TELEPHONE:

333 Bridge Street N.W.
Grand Rapids, MI 49504
(616) 336-6000

Their Attorneys

CERTIFICATE OF SERVICE

I, Nikki Klungle, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 13th day of April, 1998, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

The Honorable William Kennard
Chairman
Federal Communications Commission
1919 M Street, NW, 8th Floor, Rm. 814
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Commissioner
1919 M Street, NW, 8th Floor, Rm. 802
Washington, DC 20554

The Honorable Michael Powell
Commissioner
1919 M Street, NW, 8th Floor, Rm. 844
Washington, DC 20554

The Honorable Gloria Tristani
Commissioner
1919 M Street, NW, 8th Floor, Rm. 826
Washington, DC 20554

The Honorable Susan Ness
Commissioner
1919 M Street, NW, 8th Floor, Rm. 832
Washington, DC 20554

Mr. Keith Larsen
Assistant Bureau Chief for Engineering
Policy & Rules Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Ms. Susanna Swerling
Policy & Rules Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Mr. Roy J. Stewart
Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Ms. Susan Fox
Senior Legal Advisor
to Chairman Kennard
Federal Communications Commission
1919 M Street, NW, 8th Floor, Rm. 814
Washington, DC 20554

Ms. Helgi Walker
Legal Advisor
to Commissioner Furchtgott-Roth
Federal Communications Commission
1919 M Street, NW, 8th Floor, Rm. 802
Washington, DC 20554

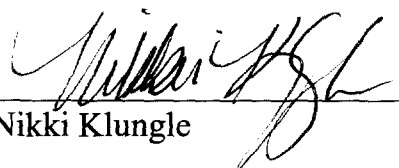
Ms. Jane E. Mago
Senior Advisor to Commissioner Powell
Federal Communications Commission
1919 M Street, NW, 8th Floor, Rm. 844
Washington, DC 20554

Mr. Rick Chessen
Senior Legal Advisor
to Commissioner Tristiani
Federal Communications Commission
1919 M Street, NW, 8th Floor, Rm. 826
Washington, DC 20554

Ms. Anita Wallgren
Legal Advisor to Commissioner Ness
Federal Communications Commission
1919 M Street, NW, 8th Floor, Rm. 832
Washington, DC 20554

Mr. Christopher Wright
General Counsel
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

International Transcription Service, Inc.
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037


Nikki Klungle